

1 KEKER & VAN NEST LLP
ROBERT A. VAN NEST - #84065
2 BRIAN L. FERRALL - #160847
DAVID SILBERT - #173128
3 MICHAEL S. KWUN - #198945
633 Battery Street
4 San Francisco, CA 94111-1809
Telephone: (415) 391-5400
5 Email: rvannest@kvn.com;
bferrall@kvn.com; dsilbert@kvn.com;
6 mkwun@kvn.com

SUSAN CREIGHTON, SBN 135528
SCOTT A. SHER, SBN 190053
WILSON SONSINI GOODRICH &
ROSATI
Professional Corporation
1700 K Street NW, Fifth Floor
Washington, D.C., 20006-3817
Telephone: (202) 973-8800
Email: screighton@wsgr.com;
ssher@wsgr.com

7
8 JONATHAN M. JACOBSON, NY SBN 1350495
CHUL PAK (*pro hac vice*)
DAVID H. REICHENBERG (*pro hac vice*)
9 WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
10 1301 Avenue Of The Americas, 40th Floor
New York, NY 10019-6022
11 Telephone: (212) 999-5800
Email: jjacobson@wsgr.com; cpak@wsgr.com;
12 dreichenberg@wsgr.com

13 Attorneys for Defendant ARISTA NETWORKS, INC.

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 CISCO SYSTEMS, INC.,
18

19 Plaintiff,

20 v.

21 ARISTA NETWORKS, INC.,

22 Defendant.
23
24
25
26
27
28

Case No. 5:14-cv-05344-BLF (NC)

**DECLARATION OF RYAN WONG IN
SUPPORT OF PLAINTIFF CISCO
SYSTEMS, INC.'S ADMINISTRATIVE
MOTION TO FILE DOCUMENTS
UNDER SEAL IN CONNECTION WITH
CISCO'S MOTIONS TO EXCLUDE
EXPERT OPINION TESTIMONY FROM
DEFENDANT'S EXPERTS (ECF NO. 426)**

Judge: Hon. Beth Labson Freeman

Date Filed: December 5, 2014

Trial Date: November 21, 2016

1 I, RYAN K. WONG, declare:

2 1. I am an attorney licensed to practice law in the State of California and am an
3 associate with the law firm of Keker & Van Nest LLP, located at 633 Battery Street,
4 San Francisco, California 94111, counsel for Defendant Arista Networks, Inc. (“Arista”) in the
5 above-referenced action. Unless otherwise stated, the facts I set forth in this declaration are based
6 on my personal knowledge or knowledge I obtained through my review of corporate records or
7 other investigation. If called to testify as a witness, I could and would testify competently to such
8 facts under oath.

9 2. I submit this declaration in support of the Administrative Motion to File Under
10 Seal Materials in Support of Cisco’s Motions to Exclude Expert Testimony of Arista Witnesses
11 Black, Clark, Elsten, and Seifert (“Motion to Seal”) filed by Plaintiff Cisco Systems, Inc.
12 (“Cisco”) on August 5, 2016 (D.I. 426). I have reviewed Cisco’s Motion to Seal and the Civil
13 Local Rules of this Court governing such motions, and submit this supporting declaration under
14 Civil L.R. 79-5(e).

15 3. Cisco’s Motion to Seal seeks to file under seal documents and information
16 submitted in support of several *Daubert* motions, which are non-dispositive motions. Because
17 Cisco’s Motion to Seal relates to non-dispositive motions, the documents and information that the
18 parties request to file under seal are **not** subject to a strong presumption of public access. *See*
19 *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). Rather, the “good
20 cause” standard of Rule 26(c) of the Federal Rules of Civil Procedure applies to the material that
21 Cisco’s Motion to Seal seeks to withhold from public view. *Id.* at 1179. Civil Local Rule 79-5
22 further requires that a party seeking to seal information and documents “establish[] that the
23 document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to
24 protection under the law.” Civil L.R. 79-5(b). The sealing request must also “be narrowly
25 tailored to seek sealing only of sealable material.” *Id.* I submit this declaration to provide
26 additional facts in support of Cisco’s Motion to Seal, and to provide facts establishing that the
27 “good cause” standard has been met for materials that Arista seeks to file under seal.

4. For purposes of a motion to seal, I understand that a “trade secret” is “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *See In re Elec. Arts, Inc.*, 298 F. App’x 568, 569–70 (9th Cir. 2008) (nonprecedential) (quoting Restatement (First) of Torts § 757 cmt. b (1939)) (applying the Restatement’s definition of trade secret in the record-sealing context); *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) (adopting the Restatement’s definition of trade secret).

5. I further understand that good cause—indeed, compelling reasons—may exist to file materials under seal when, for example, court filings could be used for improper purposes, such as “to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.” *Kamakana*, 447 F.3d at 1178–79 (citation omitted). I further understand that good cause and compelling reasons may exist where court filings contain or discuss confidential source code, *see Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 11-cv-1846, D.I. 2190 at *3 (Dec. 10, 2012); internal and non-public procedures of financial institutions, *see Cowan v. GE Capital Retail Bank*, No. 13-cv-03935-BLF, 2015 WL 1324848, at *1-3 (N.D. Cal. Mar. 24, 2015); information about an entity’s confidential “business performance, structure, and finances that could be used to gain unfair business advantage against them,” *Schwartz v. Cook*, No. 15-cv-03347-BLF, 2016 WL 1301186, at *2 (N.D. Cal. Apr. 4, 2016); “highly sensitive information regarding [an entity’s confidential] product architecture and development,” *Delphix Corp. v. Actifio, Inc.*, No. 13-cv-04613-BLF, 2014 WL 4145520, at *2 (N.D. Cal. Aug. 20, 2014); emails containing confidential information about an entity’s “business practices, recruitment efforts, and discussions regarding potential partnerships with other product manufacturers,” *see Koninklijke Philips N.V. v. Elec-Tech International Co., Ltd.*, No. 14-cv-02737-BLF, 2015 WL 581574, at *1–2 (N.D. Cal. Dec. 10, 2015); and “information regarding non-public recruitment efforts and business practices” of a party. *See id.* at *2-3.

6. Cisco submitted a declaration in support of its Motion to Seal (D.I. 426-1) that identified and attached highlighted copies of material that should be sealed. To the extent that those exhibits implicate Arista materials, I address those exhibits below. Per the instructions

provided on the Northern District of California's website, this declaration is drafted so that it does not contain or reveal confidential information, and therefore does not need to be filed under seal.

See <http://www.cand.uscourts.gov/ecf/underseal>.

7. Cisco's Notice of Motion and Motion to Exclude Expert Opinion Testimony from Defendant's Expert Dr. John Black (D.I. 426-4): Arista does **not** seek to file under seal any of the material highlighted in this document. Arista takes no position to the extent other parties or non-parties may seek to file under seal any of the material highlighted in this document.

8. Cisco's Notice of Motion and Motion to Exclude Expert Opinion Testimony from Defendant's Expert Cate M. Elsten (D.I. 426-6): Cisco's Motion to Exclude Expert Opinion testimony from Defendant's Expert Cate M. Elsten contains Arista confidential information at pages 4, 5, 6:3, and 7:7. There is good cause to seal those portions of Cisco's Motion because they discuss and disclose internal, non-public information regarding competitive intelligence and Arista sales strategies. See *In re Elec. Arts, Inc.*, 298 F. App'x at 569–70; *Delphix*, 2014 WL 4145520, at *2; *Koninklijke Philips*, 2015 WL 581574, at *1–2; see also *Schwartz*, 2016 WL 1301186, at *2 (discussing the harm that could result by the dissemination of similar sensitive internal business information to competitors, who would find it valuable).

9. Cisco's Motion to Exclude Expert Opinion Testimony of William M. Seifert (D.I. 426-8): Arista does **not** seek to file under seal any of the material highlighted in this document. Arista takes no position to the extent other parties or non-parties may seek to file under seal any of the material highlighted in this document.

10. Exhibit 1 to the Declaration of Andrew Holmes in Support of Cisco's Motions to Exclude Expert Opinion Testimony from Defendant's Experts Black, Clark, Elsten, and Seifert ("Holmes Declaration") (D.I. 426-9): This exhibit consists of portions of the Expert Report of John R. Black, Jr. dated June 3, 2016. This exhibit contains Arista confidential information at Paragraphs ¶¶ 397, 519, 525, and 678(i). There is good cause to seal these paragraphs in this exhibit. Paragraph 397 discusses and discloses internal, non-public information regarding the development and development process of the Arista EOS software, including details regarding how certain technologies were integrated into Arista's products. There is good cause to seal such

1 sensitive confidential internal information regarding “product architecture and development[.]”
 2 *See Delphix Corp.*, 2014 WL 4145520, at *2. Paragraphs 519, 525, and 678(i) discuss and
 3 disclose non-public information regarding Dr. Black’s review of Arista source code (portions of
 4 which are highly confidential), and evidence relating to such source code. There is good cause to
 5 seal such information about Arista’s confidential source code. *See Apple, Inc. v. Samsung*
 6 *Electronics Co., Ltd.*, No. 11-cv-1846, D.I. 2190 at *3 (Dec. 10, 2012); *see also Agency*
 7 *Solutions.com, LLC v. TriZetto Grp., Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011)
 8 (“[S]ource code is undoubtedly a trade secret[.]”).

9 11. Exhibit 2 to the Holmes Declaration (D.I. 426-10): This exhibit consists of
 10 portions of the Rebuttal Expert Report of John R. Black, Jr. dated June 17, 2016. This exhibit
 11 contains Arista confidential information at Paragraphs ¶¶ 148, 155, 156, 160–166, and 169–171.
 12 There is good cause to seal these paragraphs in this exhibit. These paragraphs discuss and
 13 disclose non-public information regarding both Dr. Black’s and Dr. Almeroth’s reviews of Arista
 14 source code (portions of which are highly confidential), and evidence relating to such source
 15 code. There is good cause to seal such information about Arista’s confidential source code. *See*
 16 *Apple*, No. 11-cv-1846, D.I. 2190 at *3.

17 12. Exhibit 4 to the Holmes Declaration (D.I. 426-11): This exhibit consists of
 18 transcript excerpts from the deposition of Dr. John R. Black, Jr. Arista does **not** seek to file under
 19 seal any of the material in this document. Arista takes no position to the extent other parties or
 20 non-parties may seek to file under seal any of the material highlighted in this document.

21 13. Exhibit 5 to the Holmes Declaration (D.I. 426-12): This exhibit consists of
 22 portions of the Expert Report of William M. Seifert dated June 3, 2016. This exhibit contains
 23 Arista confidential information at Paragraphs ¶¶ 90 (including footnote 78), 96 (including charts
 24 on Pages 43 and 44), 97 (including footnote 88), 98 (including footnotes 89–91), 99 (including
 25 footnote 92), 100(i), 100(ii) (including footnote 94), 100(iv) (including footnote 95), 100(v)
 26 (including footnote 97), 101, 103 (including footnote 106), 108, and 109. These excerpts from
 27 Mr. Seifert’s report contain Arista’s highly competitive business information, and there is good
 28 cause to seal them. They cite and discuss customer sales presentations, which contain sensitive

1 and non-public Arista sales and marketing strategies. Others discuss the results of product testing
 2 and confidential customer feedback, including the identities of those customers. In some cases,
 3 the excerpts recite detailed information about Arista's marketing responses to the preferences of
 4 specific segments of customers, along with sales information, all of which Arista protects as
 5 highly confidential. These excerpts also disclose sensitive market data and analysis used by
 6 Arista for competitive purposes. Good cause and also compelling reasons justify sealing these
 7 portions of Mr. Seifert's report. *See Schwartz*, 2016 WL 1301186, at *2 (discussing the harm that
 8 could result by the dissemination of similar sensitive internal business information to competitors,
 9 who would find it valuable); *Delphix*, 2014 WL 4145520, at *2 (same); *Koninklijke Philips*, 2015
 10 WL 581574, at *1–3 (same).

11 14. Exhibit 6 to the Holmes Declaration (D.I. 426-13): This exhibit consists of
 12 transcript excerpts from the deposition of William M. Seifert. This exhibit contains Arista
 13 confidential information on pages 135–36 (13:42:25–13:43:52). This excerpt discusses Arista's
 14 highly competitive business information, and there is good cause to seal it. Specifically, it
 15 discusses the contents of sensitive market data and analysis used by Arista for competitive
 16 purposes. There is good cause to justify sealing of this portion of Mr. Seifert's deposition. *See*
 17 *Schwartz*, 2016 WL 1301186, at *2 (discussing the harm that could result by the dissemination of
 18 similar sensitive internal business information to competitors, who would find it valuable);
 19 *Delphix*, 2014 WL 4145520, at *2 (same); *Koninklijke Philips*, 2015 WL 581574, at *1–3
 20 (same).

21 15. Exhibit 7 to the Holmes Declaration (D.I. 426-14): This exhibit consists of
 22 portions of the Expert Report of Cate M. Elsten dated June 3, 2016 ("Expert Report on Market
 23 Harm"). This exhibit contains Arista confidential information on Pages 9, 17, 22–23. Those
 24 pages of Ms. Elsten's Expert Report on Market Harm contain non-public and sensitive business,
 25 product pricing, and actual and prospective customer information, including information about
 26 customer requirements and preferences regarding purchasing, that Arista maintains as highly
 27 confidential. Arista also believes that its actual and prospective customers expect that
 28 information relating to their purchasing preferences and transactions is maintained in the utmost

1 confidence. Good cause—and also compelling reasons—justify sealing these portions of
 2 Ms. Elsten’s report. *See Schwartz*, 2016 WL 1301186, at *2 (discussing the harm that could
 3 result by the dissemination of similar sensitive internal business information to competitors);
 4 *Delphix*, 2014 WL 4145520, at *2 (same); *Koninklijke Philips*, 2015 WL 581574, at *1-3 (same).

5 16. Exhibit 8 to the Holmes Declaration (D.I. 426-15): This exhibit consists of
 6 portions of the Expert Report of Cate M. Elsten dated June 13, 2016 (“Rebuttal Report”). Good
 7 cause exists to seal *the entirety* of this exhibit. Ms. Elsten’s Rebuttal Report contains non-public
 8 and sensitive business, product pricing, and customer information, as well as sales and revenue
 9 data, and information about actual and prospective customer requirements and preferences
 10 regarding purchasing, all of which Arista maintains as highly confidential. Arista also believes
 11 that its actual and prospective customers expect that information relating to their purchasing
 12 preferences and transactions is maintained in the utmost confidence. Unlike Ms. Elsten’s Report
 13 on Market Harm (discussed above), this report contains sensitive Arista confidential information
 14 interwoven throughout the document. Compelling reasons—not just good cause—justify sealing
 15 the entirety of this exhibit. *See Schwartz*, 2016 WL 1301186, at *2 (discussing the harm that
 16 could result by the dissemination of similar sensitive internal business information to
 17 competitors); *Delphix*, 2014 WL 4145520, at *2 (same); *Koninklijke Philips*, 2015 WL 581574, at
 18 *1-3 (same).

19 17. Exhibit 9 to the Holmes Declaration (D.I. 426-16): This exhibit consists of
 20 transcript excerpts from the deposition of Cate M. Elsten. There is good cause to seal pages 58–
 21 60, 62–65, 81, and 212–215 of this exhibit because they contain detailed Arista confidential
 22 information concerning Arista’s contracts with its customers, its price lists and internal costs, its
 23 competitive strategies, and competitive intelligence reports. Compelling reasons—not just good
 24 cause—justify sealing those portions of this exhibit. *See Schwartz*, 2016 WL 1301186, at *2
 25 (discussing the harm that could result by the dissemination of similar sensitive internal business
 26 information to competitors); *Delphix*, 2014 WL 4145520, at *2 (same); *Koninklijke Philips*, 2015
 27 WL 581574, at *1-3 (same).
 28

